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NOVEMBER/1980 - FEBRUARY/1981 VOL. 4, No. 6

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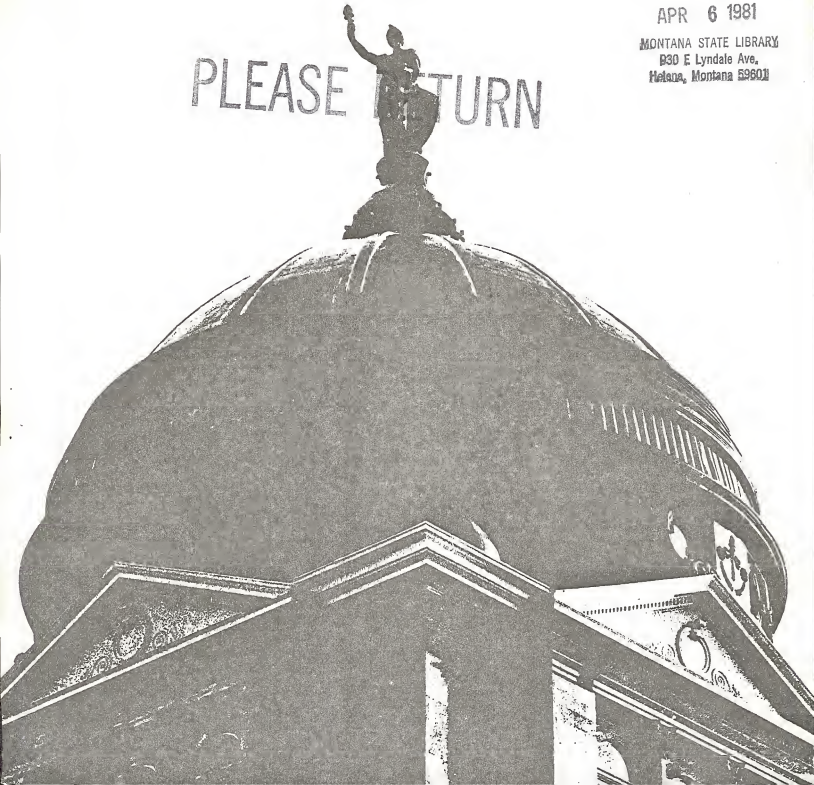

INTRODUCTORY NOTES

DELAY IN PUBLICATION

Delay in publication of this issue has been occasioned by involvement in numerous legislative and legal battles that have precluded distribution at any earlier date.

PYRAMID SCHEMES

Several possible pyramid schemes have surfaced in recent weeks. One such operation presently being scrutinized is doing business as Am Pro Marketing in Missoula. It is alleged to be closely associated with a former pyramid business called World Wide Products. Another business being scrutinized is known as the Commonwealth Club which does a substantial amount of business by mail. Whether or not these enterprises are operating legally or illegally the scope of their operations has not yet been determined. This notice is simply to alert you to possible problems in this area.

REPORT OF NDAA REPRESENTATIVE

Included with this issue is the report of Robert L. Deschamps, III, the NDAA representative for the Association concerning the activities of the Association occurring at the mid-winter conference.

PRIVACY PROTECTION ACT OF 1980

Also included with this issue is a reprint of an article concerning The Privacy Protection Act of 1980 which deals with the means by which State and Federal officers obtain criminal evidence from the news media. The Act provides an action for financial liability in the event that a violation occurs against either a Federal or State law enforcement officer. Because of the constraints and liabilities imposed by the Act and its possible impact upon your jurisdiction, this material is included for your consideration.

POST-LEGISLATIVE MEETING

When the date for the Legislature to cease operations becomes clear, a post-legislative meeting will be arranged to brief all interested prosecutors concerning legislation likely to directly affect them.

RECENT CASES AND NOTES

PRIOR CONVICTIONS - ENHANCED PUNISHMENT

A conviction occurring after the charged crime may be used to enhance punishment for the charged crime. State v. Hannah, (Ariz.) 617 P.2d 527.

COMMENT ON SILENCE

Where prosecutor made remark in closing argument concerning one of three defendants' failure to testify, the Fifth Amendment rights of all three were violated since none of the three defendants had chosen to testify. U.S. v. Rodriguez, (7th Cir.) 627 F.2d 110.

ENTRAPMENT

Although government agent initiated contact with defendant to drive stolen car to another state, this was not entrapment absent persuasive or coercive tactics to recruit defendant. U.S. v. Hill (5th Cir.) 626 F.2d 1301.

ESCAPE - WORK RELEASE FACILITY

Work release facility run by Department of Corrections constituted a "penal institution" from which unauthorized leave constituted an escape. People v. Orrs (Ill.App.) 408 N.E.2d 1105.

EXTRADITION

Defendant, who was identified as Canadian fugitive after an illegal stop and search, could not invoke the exclusionary rule at extradition hearing. Guilt or innocence is not determined at such a hearing, and this action is outside the Fourth Amendment scope of protection. Avins v. White (2d Cir.) 627 F.2d 635.

HEARSAY - TELEPHONE

Testimony by defendant's estranged wife that while the wife was talking with her sister on the telephone, the defendant entered the sister's house, quarreled with her and then shot the sister was properly admitted as evidence that defendant shot the sister. Likewise the wife's startled exclamation that defendant had just shot her sister was properly admitted. State v. Plyler (S.C.) 270 S.E.2d 126.

HOMICIDE - MOTIVE

Evidence that homicide victim and defendant had an argument three days before the murder was admissible to prove defendant's motive. State v. Plyler (S.C.) 270 S.E.2d 126.

IDENTIFICATION - LINE-UP

Line-up was not impermissibly suggestive where there were five and six-foot height marking behind the men in the line-up since such markings only provided the witness a special reference. U.S. v. Sanders (8th Cir.) 626 F.2d 1388.

MIRANDA - INTERROGATION

Police officer's statement that "There's a gun in the car", after which defendant made incriminating statement, was not an "interrogation" under Miranda. Police officer could not have reasonably anticipated that his remarks would elicit an incriminating response from defendant. U.S. v. Bennet (5th Cir.) 626 F.2d 1309.

SEARCH AND SEIZURE

Warrantless search of defendant's home following his arrest was lawful since officers had previously seen weapons in home, and officers were justified in protecting themselves from potentially dangerous occupants. U.S. v. Gardener (9th Cir.) 627 F.2d 906.

SEARCH AND SEIZURE

Where police approached parked van and smelled burning marijuana, the ensuing search of the van was legal since no action was taken until probable cause was established from odor. Simpson v. State (Tex.Cr.App.) 603 S.W.2d 862.

SEARCH AND SEIZURE - AFTER DEFENDANT IN CUSTODY

Warrantless search of defendant's car, after he had been arrested for rape, was legal where police had probable cause to believe that the car was the site of the recent attack and might still contain evidence of the rape. People v. Walls, (Ill.App.) 408 N.E.2d 1056.

SEARCH AND SEIZURE - EVIDENCE RELEASED BY HOSPITAL

Where doctor and hospital gave police defendant's clothes and bullet removed during operation there was no illegal search and seizure. Defendant went to emergency room voluntarily after the robbery, and by submitting to medical treatment he allowed the doctor to assume lawful control of bullet and clothes. Craft v. Commonwealth (Va.) 269 S.E.2d 797.

VOLUNTARINESS OF STATEMENT

Confession to murder was admissible although obtained after officer commented that defendant should confess "to make peace with yourself, your God, and your children." Defendant was at police station voluntarily, he understood his rights, and there was no psychological coercion. People v. Bowen (Ill.App.) 408 N.E.2d 993.

ARREST - PROBABLE CAUSE

Sketch of suspect, included in police bulletin, that bore a striking resemblance to defendant provided arresting officer with sufficient probable cause to arrest defendant. Shriner v. State (Fla.) 386 So.2d 525.

COMMENT ON SILENCE

Where defendant voluntarily answered pre-arrest questions, subsequently exercising his right to end the interview, non-exploitative testimony about the end did not constitute an impermissible comment on defendant exercising his rights. People v. Martinez (Ill.App.) 408 N.E.2d 358.

COMPETENCY - WITNESS EXCLUSION

Where judge thoroughly questioned seven-year-old prosecutrix on her understanding of truth and falsehood determining she was competent to testify under oath, her uncorroborated testimony would be sufficient to convict for assault and battery with intent to gratify sexual desire. Any error in allowing the mother to remain in the courtroom, after she had testified, during the daughter's testimony did not prejudice defendant and was at most technical error. Carter v. State (Ind.App.) 408 N.E.2d 790.

COUNSEL - SIXTH AMENDMENT

"'If a defendant elects to retain private counsel at a point when counsel is not constitutionally guaranteed, and that private counsel is ineffective or "betrays" the defendant, the defendant cannot allege that his Sixth Amendment rights have been infringed upon.'" United States v. Zazzara (9th Cir.) 626 F.2d 135.

FORFEITURE - DRUGS AND NARCOTICS

The mere fact that the state undercover agent suggested that defendant make an illegal sale of drugs from his car did not bar its forfeiture since the vehicle was used in the commission of an offense. People Ex Rel Carey v. 1975 Mercedes 4-Door (Ill.App.) 408 N.E.2d 377.

HEARSAY - RULE 106

Where the trigger man/state's witness had been thoroughly cross-examined about discrepancies between confessions, resulting in jury confusion, allowing the trigger man to read his two confessions to the jury to give them a better understanding was proper. Norton v. State (Ind.) 408 N.E.2d 514.

HEARSAY - WITNESSES

Citing, inter alia, three Arizona cases the Colorado Supreme Court upholds admission of the statement of a three-year-old child molest victim, made one-half-hour after the incident, that defendant hurt her "pee-pee". The hearsay statement of the victim, who was imcompetent to testify, was properly admitted as part of the res gestae (excited utterance). Lancaster v. People (Colo.) 615 P.2d 720.

IMMUNITY

A defendant has no constitutional or statutory right to insist on a grant of immunity to witnesses. State v. Clark, (Or.App.) 615 P.2d 1043.

JURY - DOUBLE JEOPARDY

Defendant was not subjected to double-jeopardy where charges were refiled following a mistrial in which a juror was admitted into hospital coronary unit. This emergency situation constituted a "manifest necessity" for a mistrial and a retrial is permitted. Reemsnyder v. State (Md.App.) 416 A.2d 767.

PLEA AGREEMENT - JUDICIAL PARTICIPATION

Defendant's guilty plea was void under state and federal constitutions where judge participated in plea negotiations, he negotiated for defendant, and he recommended that defendant plead guilty. State v. Byrd (Ohio) 407 N.E.2d 1384.

PROBATION - PROBATION REVOCATION

If a trial judge later discovers facts which, if known at the time of sentencing, would have caused the court to send defendant to prison, the court may revoke probation after suitable notice and hearing. United States v. Jurgens (9th Cir.) 626 F.2d 142.

RICO

A county prosecutor's office is an "enterprise" with the requisite nexus with interstate commerce to be within the jurisdiction of the Racketeer Influenced and Corrupt Organizations Act. Here a West Virginia state prosecuting attorney was convicted of conspiracy to violate R.I.C.O. for his part in facilitating an illegal gambling business. United States v. Altomare (4th Cir.) 625 F.2d 5.

SEARCH AND SEIZURE - CONSENT

A defendant who made anonymous call to police reporting a dead body in a specific apartment was estopped from objecting to warrantless search of such apartment. Here, defendant's initiation of police action constituted an implied consent to enter premises. Further, people reported as dead bodies are frequently alive, but in desperate need of medical attention, so exigent circumstances justified the warrantless entry. Johnson v. State, (Fla.App.) 386 So.2d 302.

SUFFICIENT EVIDENCE - CONSPIRACY

Evidence that defendant knew his co-conspirator and then smiled while nodding his head affirmatively when asked if he would be present to unload an airplane was sufficient to convict for conspiracy to import marijuana. United States v. Alvarez (5th Cir.) 625 F.2d 1196.

VOLUNTARINESS OF STATEMENT

Fact that undercover agent had his gun drawn did not make defendant's incriminating statement involuntary since the undercover agent was alone, the defendant was surrounded by his friends, expressed no fear and was not in custody. United States v. Wertz (4th Cir.) 625 F.2d 1128.

Defendant's initial inculpatory statement and subsequent written confession were found to be coerced where interrogating officers raised specter of death penalty and claimed they could get defendant lenient treatment prior to initial inculpatory statement. Brewer v. State (Fla.) 386 So.2d 232.

WITNESSES - MOTIVE

It was not improper for the prosecutor, on direct examination, to question a witness on the benefits he might possibly receive from the state in exchange for his testimony. The prosecution was entitled to ask about material showing bias, otherwise it might appear that the prosecutor was trying to "conceal damaging information from the jury." Commonwealth v. Young (Mass.App.) 408 N.E.2d 873.

EVIDENCE

Admitting the bloody pillowcase which contained the copper jacket matching the lead core of the fatal bullet found in defendant's possessions was not an abuse of discretion under Rule 403. State v. Clark (Ariz.) 616 P.2d 888.

INSTRUCTIONS - EVIDENCE

Argument that defendant's second and different story was a defense concoction was a fair comment on the evidence. Refusing a defense instruction that the reason for the delay in telling the second story was counsel's advice is upheld since the instruction would have been a comment on the evidence. State v. Clark (Ariz.) 616 P.2d 888.

MIRANDA - COUNSEL

Officers have no constitutional duty to contact defendant's lawyer before questioning him if he validly waives counsel after Miranda, and there are no set "magic words" necessary to show that defendant waived his right to counsel. The trial court was correct in admitting defendant's murder confession made without defendant's attorney being there, since even defendant testified that he made the taped statement voluntarily. State v. Loyd (Ariz.) 161 P.2d 39.

PICTURES - PHOTOS

Admission of the least objectionable photos of the murder victims illustrated witness testimony, showed how the crime was committed and were properly admitted. State v. Clark (Ariz.) 616 P.2d 888.

ACCOMPLICES

Evidence that defendant was present at the scene of an armed robbery, attempted to flee police, was in possession of a portion of the loot, and attempted to dispose of the weapon used was sufficient to sustain his conviction in spite of the fact that he did not directly participate in the actual criminal act. State v. Harris (Mo.App.) 602 S.E.2d 840.

ARREST

Where police entered defendant's home with valid consent, and once inside developed probable cause to arrest defendant, such arrest could be made without a warrant since police were legally within residence. State v. Sorrell (N.H.) 416 A.2d 1375.

CHAIN OF CUSTODY

The fact that the officer who took defendant's fingerprints gave the fingerprint card to another officer and that the fingerprint officer could not explain some initials and a date on the card did not make the fingerprint card inadmissible. The fingerprint officer testified the card was personally prepared by him and identified defendant as the person whose fingerprints were on the card. State v. Montoya (N.M.) 616 P.2d 417.

The fact the FBI lab did not find blood on the boots until the boots were resubmitted by the police department for a second examination did not mean the boots were tampered with while in police custody. Testimony by the officers and agent involved established prima facie proof that the boots were not tampered with and defendant failed to meet his burden of proof that the boots were tampered with. State v. Armstrong (Mont.) 616 P.2d 341.

DRUGS AND NARCOTICS

Evidence that after knocking and announcing, officers heard walking away noises, a flush, entered and found defendant with wet arms covered with a greenish substance and found twenty four envelopes, some containing marijuana residue, etc., was sufficient to sustain defendant's conviction for possession with intent to distribute. Hudson v. State (Ga.App.) 269 S.E.2d 89.

ESCAPE

"Specific intent is not an element of the crime of escape." Here it was no defense that appellants intended to return to a minimum security prison after making a "booze run" since the crime was completed when they wilfully left confinement. People v. George, (Cal.App.) 167 Cal.Rptr. 603.

FLIGHT - INSTRUCTIONS

"And a majority of jurisdictions have held that, provided the jury is properly instructed, evidence of flight may be taken into consideration even though two or more charges are pending." Shults v. State (Nev.) 616 P.2d 388.

HEARSAY - INTERPRETERS

A police officer's testimony about the answers obtained from the deaf-mute defendant through an interpreter was properly admitted even though the interpreter did not remember what defendant said. The interpreter had excellent qualifications, testified that she interpreted accurately and the defendant did not challenge the accuracy of her translations. State v. Letterman (Or.App.) 616 P.2d 505.

HOMICIDE INSTRUCTIONS

A voluntary manslaughter instruction was correctly rejected where defendant chased down his estranged girl-friend and the man she was dating and killed them both. Even if the killing was in the heat of passion, the provocation was not adequate provocation to justify the instruction. State v. Robinson (N.M.) 616 P.2d 406.

PAROLE REVOCATION

Neither double jeopardy nor collateral estoppel prevent defendant's parole from being revoked on the basis of evidence from a trial at which defendant was acquitted of the underlying charge. Avery v. State (Alaska) 616 P.2d 872.

PRIOR BAD ACTS

A statement by the pale and shaking victim to friends in her choir music class that the defendant had attempted to kill her that morning was properly admitted under Rule 803(2) and Rule 804 (b)(2). (Defendant killed the victim later that same afternoon.) State v. Robinson (N.M.) 616 P.2d 406.

PRIOR BAD ACTS

Evidence that one defendant was wanted on a bench warrant for a felony theft charge and evidence another defendant committed a robbery was admissible in their trial for killing a police officer who stopped them for a traffic violation. No conviction was necessary to make the prior bad acts admissible, since they formed the motive for the killing. State v. Myrick (Kan.) 616 P.2d 1066.

Evidence that during the charged kidnappings defendant raped one of the victims was properly admitted under Rule 404(b). The state is entitled to show all relationships between defendant and the victims and is not required to present a time sequence of the crime with gaps in it. United States v. Gibson (9th Cir.) 625 F.2d 887.

PRIOR INCONSISTENT STATEMENT - IMPEACHMENT

A videotape reinactment made by defendant's eight-year-old son was properly admitted at trial as a prior inconsistent statement when the son testified that he had forgotten most of what happened on the night his baby brother was killed. Richards v. State (Alaska) 616 P.2d 870.

SEARCH AND SEIZURE

Liquor inspectors, who gained entrance to a fraternity party by concealing their identity, did not violate the Fourth Amendment since the purpose for the entry (purchase of liquor) was contemplated by occupants and occupants had no legitimate expectation of privacy. A sign "no pets or liquor control agents allowed" did not give defendants an expectation of privacy. State v. Carey (Me.) 417 A.2d 979.

SEARCH AND SEIZURE - COUNSEL

Accused was not denied due process where government refused to permit her attorney to attend hearing at which agents sought strip search order. This proceeding, like an application for a search warrant, is traditionally ex parte. U.S. v. Erwin (9th Cir.) 625 F.2d 838.

SEARCH AND SEIZURE - STANDING

In prosecution for receiving stolen goods, defendants' failure to claim a proprietary interest in property searched and seized barred them from challenging the warrantless search and seizure. State v. Cortellesso, (R.I.) 417 A.2d 299.

SEXUAL ASSAULT - RAPE

"Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial." State v. Fortney (N.C.) 269 S.E.2d 110.

SEXUAL ASSAULT - WITNESS SEQUESTRATION

Court's refusal to sequester mother of 13-year-old rape victim under Rule 615 was proper, although mother was also a witness, since no prejudice resulted from her presence and the court may permit the presence of a young witness' parent. Government of Virgin Islands v. Edinborough (3rd Cir.) 625 F.2d 472.

STIPULATION - PICTURES

A defense offer to stipulate that the victim died of gunshot wounds did not prevent introduction of photos of the scene and of a videotape showing the body as it was discovered at the crime scene. "Competent evidence is not inadmissible solely because it is gruesome. ***Nor can a brutal crime 'be explained to a jury in a lily-white manner to save the members of the jury the discomfiture of hearing and seeing the results of such criminal activity.'" State v. Tharp (Wash.App.) 616 P.2d 693.

TRAFFIC OFFENSES - MIRANDA

In a case with a good collection or Oregon authority, the court holds that answers to questions necessary for a field sobriety test, asked without benefit of Miranda and after defendant objected twice to the whole proceeding, were properly admitted. Telling defendant if he didn't take the tests the officer would have to arrest him was not coercion since the officer was merely telling defendant what the law let him do, and, as the officer told defendant, he was giving defendant a chance to prove there was nothing wrong with him. A tape-recording of defendant's speech and inability to recite the alphabet did not violate the Fifth Amendment, since the evidence was physical evidence of slurred speech, not evidence of what the defendant said or admitted. State v. Medenbach (Or. App.) 616 P.2d 543.

Staff estimates on the cost of the two options determined that Washington would cost $456.000.00 per year versus $356,000.00 in Williamsburg, primarily due to higher rent and costs of living in D.C., plus the need to hire some additional clerical help which would be available free in Williamsburg. The staff also estimated next year's income at $356,500.00.

Thus, by going to Williamsburg, we would probably be able to function on our revenue. Under the Washington option we will probably have to use up our reserve within the next year and be looking for additional revenue in one year in order to remain solvent.

The discussion became quite heated, culminating in a roll-call vote. 23 directors voted to go to Washington D.C. and 7 voted to go to Williamsburg. I voted for Williamsburg since I thought that was more prudent and probably in accord with the views of most Montana County Attorneys.

In any event, the NDAA will be relocating in the Washington D.C. area sometime this spring.

Another item of interest was the board's agreement to participate in a National Center on Obscenity request for a federal grant. If awarded, the NDAA members will get $40,000.00, plus all NDAA members will be able to get one-half subscriptions to the Center's Obscenity Law Reporter.

Upcoming events include a May 3-6 National Legislative Conference in Washington D.C. This should be an excellent conference and probably will include an appearance by President Reagan and at least one member of the U.S. Supreme Court. We would obviously like a large turnout to make a good impression.

The mid-summer conference will be July 19-23 in Orlando, Florida.

The 1982 mid-winter conference will be in New Orleans.

The 1982 mid-summer conference will be in Boston.

President Reagan will be announcing April 20-26 as National Victim Rights week.

The general membership meeting occurred on February 17-19 and was attended by myself, Charles Gravely and John Radonich.

I appreciate the chance to serve you as our Montana director to the NDAA, and solicit any member's suggestions or questions on

MISSOULA COUNTY
OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59801
TELEPHONE: (406) 721-5700

ROBERT L. DESCHAMPS III
COUNTY ATTORNEY

February 20, 1981

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Helena, Montana

Richard Heinz
President
Montana County Attorney's
Association
Courthouse
Polson, Montana 59860

RE: Report on NDAA mid-winter meeting, February 14 - 19.

Dear Richard:

Please accept this as my report on my activities as the Montana director to the National District Attorney's Association. I'm not certain if my report from the summer meeting was shared with the membership of the County Attorney's Association or not, and I do request that these reports be published in the "Montana Prosecutor" so the membership is kept advised of my activities.

The Board of Directors met on February 14 and 15. You will recall that in my last report I advised that the NDAA was some $200,000.00 in debt due to a variety of reasons. I am happy to report that this situation has changed, due to the sale of our lease on the Chicago offices for some $400,000.00. The lease was purchased by the owners of the building who desire to vacate the building to facilitate a major remodeling. As a result of this transaction, NDAA has paid all its debts, and has a current reserve of approximately $100,000.00.

The primary issue before the board was where to move, since we must vacate our present space by March 15. Everyone believed it would be advantageous to move to the Washington D.C. area, but the harmony ceased there.

One faction felt it was better to move to Williamsburg, Virginia in connection with the National Center for State Courts. We have agreements with the Center to do most of our future publications, etc., and can get space there at attractive rates and share several personnel positions. Under this option, a small office would also be maintained in Washington D.C., but the primary emphasis of the association would be on membership services and program development.

The other faction believed the NDAA should maintain its head offices in Washington and take on a high profile lobbying stance. A satelite office would be maintained in Williamsburg.

the organization or my actions as the Montana director.

Sincerely,

Robert L. Deschamps III
Missoula County Attorney

RLD/dc

cc: Marc Racicot

THE PRIVACY PROTECTION ACT OF 1980

By Larry E. Rissler
Special Agent
Legal Counsel Division
Federal Bureau of Investigation
Washington, D.C.

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

One of the more significant contributions of the United States to the science of government is the concept of separation of powers. The American Constitution created three distinct branches of Federal Government, each with specified duties and responsibilities. In the criminal law context, the role of the executive branch is undisputed. It is to investigate, identify, and prosecute those suspected of criminal activity. The traditional role of the legislative branch has been in matters of substantive criminal law, while the judicial branch has decided issues relating to procedural criminal law. That is to say that Congress has sought to identify those forms of personal conduct which should be subject to criminal sanction. This process, of course, is accomplished by enacting criminal laws and affixing punishments to them. The role of the courts has been to establish rules and procedures for the collection of evidence by executive branch officers. This has largely been done through interpretation of the fourth amendment's prohibition against unreasonable searches and seizures.

Put another way, it has been the responsibility of the legislature to determine what constitutes criminal conduct and the task of the judiciary to establish how investigations and prosecutions of offenders must proceed. However, from time to time, Congress has asserted itself in the procedural criminal law area and has sought to direct the means by which law enforcement officers obtain evidence.[1] Several recent statutes are illustrative.

For example, in 1976, as part of the Tax Reform Act,[2] Congress established a detailed procedure for Federal officers to follow when attempting to obtain tax return information in nontax-related criminal investigations. Two years later, in the Right to Financial Privacy Act,[3] Federal investigators were prohibited from examining depositors' financial records maintained by banks unless one of five separate procedures is used. (An earlier Supreme Court decision had found no constitutional bar to the government's access to financial records.[4]) And last year, two proposals were introduced which, if passed, would have created procedures governing access to medical records maintained by hospitals and toll records kept by telephone companies.[5]

In the provisions of yet another law, the Privacy Protection Act of 1980 (hereinafter Act), Congress has legislated the means by which State and Federal officers obtain criminal evidence from the news media.

Background

The Privacy Protection Act was Congress' response to the U.S. Supreme Court's 1978 decision in *Zurcher* v. *Stanford Daily*.[6] *Zurcher* involved the execution of a search warrant against the premises of an innocent third party, the student newspaper of Stanford University, in an attempt to seize photographs of a demonstration which had occurred earlier at a local hospital. Several officers had been injured by the demonstrators, and it was believed the Stanford Daily, which had covered the incident, possessed photographs which could assist in identifying the officers' assailants. No members of the paper's staff were suspected of criminal conduct.

The search warrant was executed by four police officers who searched desks, filing cabinets, photo labs, and waste baskets located within the newspaper's offices. Locked drawers and rooms were not opened. No photographs were located. Approximately 1 month later, the Stanford Daily and members of its staff filed a civil suit in Federal court against the officers who had executed the warrant, the chief of police, and several other officials, alleging that the search had violated the fourth amendment's prohibition against unreasonable searches and seizures. The trial court and court of appeals ruled in favor of the Stanford Daily, reasoning that the fourth amendment "forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause to believe . . . that a subpoena duces tecum would be impracticable."[7] It was further held that where the innocent object of a search is a newspaper, first amendment interests are involved, and a search warrant is permissible only if the government can clearly show that important materials will be destroyed or removed and a restraining order would be futile.

The U.S. Supreme Court later reversed. In an opinion joined by six members of the Court, it held that the fourth amendment does not bar the use of a search warrant for premises occupied by a person who is not a

Special Agent Rissler

". . . the purpose of the Act is not merely to protect materials used to prepare an existing or anticipated publication, but also those prepared for the purpose of publication. . . ."

suspect in the crime under investigation. As long as probable cause exists to believe that evidence is located in the place to be searched, a search warrant may be properly issued. The majority reasoned that evidence might be lost if the law required subpenas to obtain evidence in the hands of third parties. As stated by the Court, "the subpoena duces tecum, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party."[8]

The Court also found that the fourth amendment's preconditions for the issuance of a search warrant (probable cause, need to describe specifically the place to be searched and things to be seized, overall requirement of reasonableness), when applied with "particular exactitude," are adequate to safeguard the first amendment interests which are endangered when the place to be searched is a press office.

The opinion concluded by noting: "The (f)ourth (a)mendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure. . . ."[9]

The *Zurcher* decision was not a departure from established law. It did not extend the government's authority to search and seize to new sources of evidence. On the contrary, the Court characterized the lower court's decision restricting the use of search warrants against third parties as "remarkable," without "direct authority," and a "sweeping revision of the fourth amendment."[10] Nevertheless, the opinion was quickly criticized by many segments of the press. One leading newspaper denounced it as "a first step toward a police state."[11] Another urged immediate action by Congress to "enact added protections for individual privacy and press freedom."[12] Within days, legislation was introduced to limit warrant-authorized searches of the premises of those engaged in activities protected by the first amendment. A month later, congressional hearings began to determine the impact of *Zurcher*. And in 1980, Congress passed Public Law 96-440, the Privacy Protection Act of 1980. It was quickly signed by the President and became effective on January 1, 1981, against the United States. (It will take effect 1 year later against State or local governments.) Because the Act creates a civil cause of action for damages against the United States, a State or local government, and certain State law enforcement officials who violate its provisions, all local, State, or Federal officers should be familiar with its language.

Stated briefly, the Act makes it unlawful for Federal, State, or local officers investigating a criminal offense to search for or seize "work product" or "documentary" materials possessed by a person in connection with, or with a purpose of, disseminating a public communication in or affecting interstate or foreign commerce.

What Is Protected?

The Act affords protection to two distinct categories of potential evidence. One is work product materials, the other documentary materials. Work product is defined as materials (other than contraband, fruits, or instrumentalities) created in anticipation of communicating such materials to the public. They must be possessed for the purpose of public communication and include mental impressions, conclusions, opinions, or theories of the person who prepared or authored them.[13] Obvious examples would be notes and drafts of an article made by a reporter or the photographs sought in the *Zurcher* case. To qualify as work product, the material need not have been prepared or authored by the person in possession. Thus, unsolicited material, such as a report revealing government corruption made by a "whistle blower" and mailed to a newspaper for possible publication, would constitute work product.

Because the purpose of the Act is not merely to protect materials used to prepare an existing or anticipated publication, but also those prepared for the purpose of publication, materials qualify as work product even though the plans to publish are subsequently abandoned. For example, assume an author prepares research notes and writes a paper which is later rejected for publication. The notes and article would still receive work product protection because they were gathered and prepared for the purpose of dissemination to the public.

Conversely, the fact that an item *was* published does not necessarily mean that materials used to prepare it will receive work product protection. If the materials were originally held for purposes other than publication, they would not be considered work product. Examples would be data used to prepare business records or documents required to be filed with the government and which later happen to be published. Another example would exist if a citizen was photographing an event when a crime occurred, and he later sold the photographs to a newspaper or magazine. The photos would not qualify as work product because at the time they were taken the citizen did not intend to disseminate them to the public. (They may, however, be protected as documentary materials.)

Documentary materials are defined as materials (other than contraband, fruits, or instrumentalities) upon which information is recorded. It includes printed materials, photographs, motion picture films, negatives, video and audio tapes, and mechanically, magnetically, or electronically recorded cards, tapes, or discs [14] held by a person in connection with the purpose of making a public communication.

The precise contours of the distinction between work product and documentary materials will ultimately have to be defined in the courts. But for now, a reasonable reading of the Act indicates that work product includes notes or other materials made by an author himself containing his mental impressions, conclusions, or opinions, made while preparing a public communication. It would also include the communication itself prior to publication or broadcast.

Documentary materials would appear to include data and materials supplied to or collected by a person who intends to draft a public communication. It is likely they would have been routinely prepared by other individuals with no intent to publish and thus contain no "impressions, conclusions, opinions, or theories of the person . . ." [15] intending to make the public communication.

When Is a Search Warrant Permitted?

Despite acknowledgment in the Act's legislative history that officers occasionally may be uncertain whether items sought constitute work product or documentary materials,[16] the distinction between the two appears to be very important. Because work product involves the creative, mental process, the Act affords it a higher level of protection than documentary materials by imposing a general no-search rule. When the items sought are documentary materials, a subpena-first rule is generally applicable.

The no-search rule for work product materials simply means that government officials may not search for or seize work product unless one of two conditions exist. First, a search warrant may be obtained if "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate. . . ." [17] Thus, if the possessor himself is violating the law and the materials relate to that violation, a search warrant is permitted. It should be noted, however, that this exception does not apply if the offense of which the possessor is suspected is the receipt or possession of the materials sought. The reason for not including receiving and possessing offenses in the exception is that without it "reporters' investigations of such areas as government corruption where whistle blowers' evidence is so important" [18] would be chilled. (Note, however, that if the receipt or possession of the documents constitute an offense under an existing *espionage* law, a search warrant would be permissible.)

Second, a search warrant for work product materials may be obtained if there is reason to believe that an immediate seizure is necessary "to prevent the death of, or serious bodily injury to, a human being." [19] The standard "reason to believe" as used in this exception is less demanding than the "probable cause" standard required for the issuance of a warrant, but higher than mere suspicion.[20]

It should be emphasized that these are the only two conditions which will justify the issuance of a search warrant for work product materials. If an attempt to obtain documents with a subpoena duces tecum is unsuccessful, even in the face of a contempt citation, a search warrant is nonetheless prohibited.

When the items sought are "documentary materials," the Act creates four exceptional circumstances which would permit issuance of a search warrant. In addition to suspect and life-in-danger exceptions identical to those outlined for work product materials, the Act creates two other "subpena-first" exceptions. Under one, a warrant may

". . . the Act makes it unlawful for Federal, State, or local officers investigating a criminal offense to search for or seize 'work product' or 'documentary' materials. . . ."

be obtained if there is reason to believe that the advance notice given by a subpena would result in destruction or concealment of the documentary materials sought.[21] An example would be if a reporter had previously obstructed an investigation or announced that he would destroy the materials rather than comply with a request or subpena. Others might exist if there was a close personal relationship between the suspect and the possessor of the documents or if the suspect himself had access to the materials sought. And finally, a search warrant is permissible if the subpena process has been tried, the documentary materials have not been produced, and either all appeals have been exhausted or a further delay would threaten the interests of justice.[22] (If a warrant is sought under the interests of justice exception, the possessor of the materials must be allowed to file an affidavit challenging the issuance of the warrant if he believes the materials are not subject to seizure.)

Who Can Bring Suit?

The statute's protection is extended to all who possess "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication. . . ."[23]

The effect of this broad language is to reach almost everyone engaged in first amendment pursuits. Obviously included are employees of the institutional press (newspapers, radio, and television stations), but the Act is broad enough to also include academicians, authors, filmmakers, and photographers. The only limitation is the requirement that the person possess the materials with the purpose of making a public communication for dissemination in (or affecting) interstate or foreign commerce.[24] Although the term "public communication" is not defined in the Act, it is the intent of Congress that the phrase include any communication distributed to the general public or available upon simple request.[25] This would clearly cover publications by major newspapers or magazines, as well as books, and electronic broadcasts. It would also appear to include publications by small town newspapers, professional journals, and possibly "political campaign materials or a press conference."[26]

It should be noted that no criminal sanction attaches for violating the Act. Instead, a civil cause of action for damages[27] (in Federal court) has been created for a "person aggrieved" by a search in violation of the Act. Actual damages are specified by the statute, with a minimum amount of $1,000 to be awarded.[28] The court may also award reasonable attorney's fees. By giving civil relief only to a "person aggrieved," the statute effectively eliminates as a potential plaintiff the criminal suspect incriminated by the seized evidence. This is consistent with the bill's purpose of protecting only innocent third parties who are engaged in first amendment activities. Using the facts of the *Zurcher* case as an example, it would be the staff members of the Stanford Daily who could bring suit, not the demonstrators to whom the evidence related. It is also clear that a violation of the Act would provide no basis to a criminal defendant for the exclusion of evidence.[29]

Who Can Be Sued?

The Act allows a person aggrieved by a search and seizure in violation of the Act to sue for damages. If the search was conducted by Federal officers, the suit will be against the United States.[30] A suit against the Federal employee personally is not provided for by the Act. Because of this and the fact the Act provides for no exclusionary sanction, in order to deter Federal investigators from violating its provisions with impunity, the Act requires the Attorney General to establish procedures for an administrative inquiry after a determination that an employee has violated the Act.[31] A provision for an administrative sanction against such employee is mandated, if warranted. The exact mechanics and sanctions of this procedure will not be known until the Attorney General's guidelines are formally adopted. Again, this provision is applicable only in regard to Federal officers.

When the violation is by an officer employed by a State, and that State has waived its sovereign immunity from civil suit, the action must be brought against the State.[32] However, if the State has not waived its sovereign immunity, the action will be against the State officer personally.[33] In that event, the Act specifies that the employee may assert as a defense his reasonable good faith belief in the lawfulness of his conduct.[34] However, if the suit is against the government (Federal, State, or local), the government may not assert as a defense the reasonable good faith belief of its employee.[35] In other words, strict liability attaches when the defendant is the government.

If the violation was committed by an employee of "any other governmental unit," the suit shall be against that government.[36] "Any other governmental unit" includes a municipality, county, territory or possession, the District of Columbia, or the Commonwealth of Puerto Rico.[37]

Conclusion

It is important to emphasize what the Privacy Protection Act of 1980 does and does not do. It does not prevent the government from obtaining documentary evidence possessed by the news media. It simply establishes the means by which that evidence may be obtained. As noted earlier, officers may make simple requests or seek subpoenas duces tecum for the production of the desired materials. It does prohibit the use of search warrants against individuals engaged in first amendment pursuits who are not suspected of criminal conduct unless one of four narrowly drawn exceptions exist. It does not prevent the issuance of a search warrant for contraband, fruits, or the instrumentalities of crime. It does not affect searches and seizures at the borders or points of entry into the United States in order to enforce the customs laws. It does not have any effect on searches conducted by private individuals. Nor does it affect seizures by government officials which arise out of civil matters, such as seizures of assets to satisfy debts or taxes owed to the government or examinations of records of regulated businesses.

Finally, the Act itself does not regulate the seizure of evidence from innocent third parties, such as doctors, lawyers, and clergymen, who are not engaged in first amendment activities. However, the Act does require the Attorney General to issue guidelines governing such seizures by *Federal officers*.

FBI

Footnotes

[1] A major example is Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. Secs. 2510-2520), in which Congress regulated wiretappings and electronic eavesdropping on a Federal level. Of course, legislatures have traditionally directed many of the technical aspects of the seizure of evidence, such as the issuance, execution, and return of search warrants. See, e.g., Fed. R. Crim. P. 41.

[2] 26 U.S.C. Sec. 6103(i)(1).

[3] 12 U.S.C. Secs. 3401-3422.

[4] *United States v. Miller*, 425 U.S. 435 (1976).

[5] See S. 503 and H.R. 5935, 96th Cong. 2d Sess. (1980); H.R. 6215, 96th Cong. 2d Sess. (1980).

[6] 436 U.S. 547 (1978).

[7] *Id.* at 552.

[8] *Id.* at 561.

[9] *Id.* at 567.

[10] *Id.* at 534, 538.

[11] *Boston Globe*, 124 Cong. Rec. H5664 (daily ed. June 15, 1978).

[12] The *New York Times*, June 6, 1978, at A16, Col. 2.

[13] Act, Sec. 107(b).

[14] *Id.* at Sec. 107(a).

[15] *Id.* at Sec. 107(b)(3).

[16] See Report of the Committee on the Judiciary, U.S. Senate, No. 96-874 at 10. (Hereinafter Senate Report.)

[17] Act, Sec. 101(a)(1).

[18] Senate Report, at 11.

[19] Act, Sec. 101(a)(2).

[20] See Report of the Committee on the Judiciary, U.S. House of Representatives, No. 96-1064 at 8. (Hereinafter House Report.)

[21] Act, Sec. 101(b)(3).

[22] *Id.* at Sec. 101(b)(4).

[23] *Id.* at Sec. 101(a).

[24] *Id.* at Secs. 101(e), 101(b). The authority for Congress to regulate State and local law enforcement is the commerce clause, U.S. Const. Art. I, Sec. 8. The Supreme Court has held that this clause empowers Congress to regulate activity which has an effect on interstate or foreign commerce. See *Perez v. United States*, 402 U.S. 146 (1971). There is little doubt that the dissemination of information affects interstate commerce.

[25] House Report at 6.

[26] *Id.*

[27] Act, Sec. 106(a).

[28] *Id.* at 106(f).

[29] *Id.* at 106(e).

[30] *Id.* at 106(e)(1).

[31] *Id.* at 106(g).

[32] *Id.* at 106(a)(1).

[33] *Id.* at 106(a)(2).

[34] *Id.* at 106(b).

[35] *Id.* at 106(c).

[36] *Id.* at 106(a)(1).

[37] *Id.* at 107(c).